

1 **Gary W. Osborne (Bar No. 145734)**  
2 **Dominic S. Nesbitt (Bar No. 146590)**  
3 OSBORNE & NESBITT LLP  
4 501 West Broadway, Suite 1760  
5 San Diego, California 92101  
6 Phone: (619) 557-0343  
7 Fax: (619) 557-0107  
8 [gosborne@onlawllp.com](mailto:gosborne@onlawllp.com)  
9 [dnesbitt@onlawllp.com](mailto:dnesbitt@onlawllp.com)

10 Attorneys for Plaintiff  
11 LA JOLLA COUNTRY DAY SCHOOL

12 UNITED STATES DISTRICT COURT  
13 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

14 LA JOLLA COUNTRY DAY  
15 SCHOOL, a California Non-Profit  
16 Corporation,

17 Plaintiff,

18 vs.

19 PHILADELPHIA INDEMNITY  
20 INSURANCE COMPANY, a  
21 Pennsylvania corporation,

22 Defendants.

CASE NO. '11CV0868 LAB WMC

**COMPLAINT FOR BREACH OF  
CONTRACT; BREACH OF  
STATUTORY DUTY (Cal. Civ. Code  
§ 2860); TORTIOUS BREACH OF  
THE IMPLIED COVENANT OF  
GOOD FAITH AND FAIR DEALING;  
AND FOR PUNITIVE DAMAGES**

23 Plaintiff La Jolla Country Day School ("LJCD") respectfully alleges as follows:

24 **INTRODUCTION**

25 This case is about an insurance company's deliberate withholding of insurance  
26 benefits owing to its insured. The benefits in question are independent counsel fees  
27 which the plaintiff, LJCD, has incurred pursuant to California Civil Code section 2860,  
28 *i.e.*, the *Cumis* statute.

1       There is no dispute that the defendant, Philadelphia Indemnity Insurance Company  
2 (“Philadelphia”), owes LJCD’s independent counsel fees. Philadelphia agreed to defend  
3 a lawsuit brought against LJCD by a former student, while reserving its right to deny  
4 coverage if LJCD was found to have acted intentionally. Philadelphia eventually  
5 acknowledged that this reservation triggered LJCD’s statutory right to be represented by  
6 independent counsel, and expressly agreed in writing that it would pay LJCD’s  
7 independent counsel fees.

8       Put quite simply, it is now almost one year later, and Philadelphia has still not paid  
9 a single penny of the fees and costs of LJCD’s independent counsel.

10       An insurer does not satisfy its duty to defend by merely making empty promises.  
11 Instead, the duty to defend is only satisfied, in cases where a *Cumis* conflict exists, by the  
12 insurer actually paying the fees and costs of its insured’s independent counsel. By  
13 deliberately failing to pay any of the fees and costs of LJCD’s independent counsel,  
14 Philadelphia has breached its duty to defend.

15       LJCD seeks by this lawsuit to recover not only damages for Philadelphia’s  
16 breaches of its duty to defend and statutory obligations, together with prejudgment  
17 interest, but also tort and punitive damages both to punish Philadelphia and to dissuade it  
18 in the future from deliberately violating California’s statutory and insurance laws when  
19 doing business with residents of this state.

## 20                                   **JURISDICTION AND VENUE**

21       1.     This Court has jurisdiction over the subject matter of this complaint pursuant  
22 to 28 U.S.C. § 1332(a) because there is complete diversity of citizenship between the  
23 parties and the amount in controversy exceeds the sum of \$75,000, exclusive of interest  
24 and costs.

25       2.     Venue is proper in this District under 28 U.S.C. §1391(a) and (c), as the  
26 contracts of insurance which are the subject of this action were entered into, and were to  
27 be performed, within this District, the underlying lawsuit giving rise to this claim was  
28 filed in this district, and defendant resides here.

1 **THE PARTIES**

2 3. Plaintiff LJCD is a non-profit corporation duly organized and existing under  
3 the laws of the State of California, with its principal place of business in San Diego,  
4 California.

5 4. Defendant Philadelphia is, and at all relevant times has been, a corporation  
6 organized and existing under the laws of the State of Pennsylvania, with its principal  
7 place of business also in Pennsylvania.

8 **GENERAL ALLEGATIONS**

9 **A. Philadelphia Insured LJCD, Promising a Defense Against Professional**  
10 **Liability Claims**

11 5. Philadelphia issued a CGL policy to LJCD, designated by policy number  
12 PHPK351983, with a policy period of October 1, 2008 to October 1, 2009, and with  
13 policy limits of \$1 million per occurrence and \$3 million in the aggregate. Philadelphia's  
14 CGL policy included a "Human Services Organization Professional Liability Coverage  
15 Part" with the same policy number, policy period, and policy limits.

16 6. Philadelphia promised under this Professional Liability Coverage Part to  
17 defend LJCD (including its board members, directors, officers, administrators,  
18 employees, etc.) against any lawsuit seeking damages arising out of a "professional  
19 incident" in the course of performing professional services.

20 **B. LJCD and Two of the School's Administrators Are Sued in an**  
21 **Underlying Lawsuit**

22 7. On April 3, 2009, during the term of Philadelphia's policy, a former student  
23 (designated as "Barbara B.") filed a lawsuit before the San Diego County Superior Court,  
24 entitled *Barbara B., et al. v. La Jolla Country Day School, et al.* Barbara B.'s complaint  
25 named LJCD and two of the school's administrators as defendants.

26 8. Barbara B. alleged that she had been bullied by other students and that  
27 LJCD's administration had responded inadequately to this problem, eventually resulting  
28 in her leaving LJCD. The lawsuit threatened to damage LJCD's reputation in the local

1 community. The plaintiff's father told a LJCD coach that he intended to drag LJCD  
2 "through the mud" for threatening to expel his daughter because of disciplinary problems.

3 9. Barbara B. alleged causes of action against all three LJCD defendants for  
4 "Intentional Infliction of Emotional Distress" and "Breach of Contract." Her complaint  
5 was later amended at trial to allege additional causes of action for "Negligence" and  
6 "Negligent Infliction of Emotional Distress."

7 **C. Philadelphia Breached its Duty to Defend as Well as its Statutory Duties**  
8 **under California Civil Code Section 2860**

9 10. Immediately upon being served with the *Barbara B.* complaint, LJCD  
10 tendered it to Philadelphia. On or about May 1, 2009, Philadelphia agreed to defend the  
11 LJCD defendants. Subsequently, on June 15, 2009, Philadelphia issued a reservation-of-  
12 rights letter informing the LJCD defendants that it was reserving its right to deny  
13 coverage if they were found liable for intentional conduct.

14 11. Philadelphia's reservation-of-rights letter created a paradigm *Cumis* conflict  
15 of interest which triggered the LJCD defendants' statutory right to be represented by  
16 independent counsel pursuant to Civil Code section 2860. Philadelphia owed a statutory  
17 duty under section 2860(a) to inform its insureds that a conflict of interest existed and to  
18 obtain a written waiver of the insureds' statutory right to independent counsel before  
19 continuing to defend them using panel defense counsel.

20 12. For a year, between May 2009 and May 2010, Philadelphia violated section  
21 2860 by failing to notify the LJCD insureds of their right to independent counsel and by  
22 conducting their defense through the services of its panel defense counsel.

23 13. On June 7, 2010, Philadelphia finally acknowledged the insureds' statutory  
24 right, but offered to pay LJCD's independent counsel, Sheppard Mullin Richter &  
25 Hampton LLP, only reduced rates of \$165 per hour for partners. This was a clear  
26 violation of section 2860(c) (which requires insurers to pay an insured's independent  
27 counsel the same rates it pays to its panel counsel to defend "similar actions in the  
28 community where the claim arose or is being defended") because Philadelphia at the time

1 paid partners at its San Diego panel defense firms a rate of \$190 per hour. After LJCD  
2 challenged Philadelphia on this point, it agreed to pay rates of \$190 per hour to Sheppard  
3 Mullin.

4 14. LJCD submitted to Philadelphia Sheppard Mullin's monthly invoices.  
5 Despite repeated requests and demands by LJCD, and in spite of Philadelphia's clear  
6 written agreement to pay independent counsel's fees, Philadelphia has deliberately failed  
7 to pay any of them.

8 **FIRST CLAIM FOR RELIEF**

9 **Breach of Contract (Duty to Defend)**

10 (By LJCD against Philadelphia)

11 15. Plaintiff incorporates and re-alleges paragraphs 1 through 14 as though fully  
12 set forth herein.

13 16. Plaintiff performed all conditions, covenants, and promises required on its  
14 part to be performed in accordance with the terms and conditions of Philadelphia's  
15 Professional Liability Coverage Part.

16 17. Philadelphia breached its duty to defend by failing to pay any of the fees and  
17 costs of its insureds' independent counsel.

18 18. As a direct and proximate result of the above-mentioned breaches of contract  
19 by Philadelphia, LJCD has been damaged in an amount to be proven at trial, which  
20 includes all of the reasonable and necessary fees and costs of its independent counsel,  
21 calculated at full rates, in a total amount to be proven at trial.

22 **SECOND CLAIM FOR RELIEF**

23 **Breach of Statutory Duties Under California Civil Code Section 2860**

24 (By LJCD against Philadelphia)

25 19. Plaintiff incorporates and re-alleges paragraphs 1 through 14 as though fully  
26 set forth herein.

27 ///

28 ///



1           26. LJCD is informed and believes and on that basis alleges that Philadelphia  
2 breached its duty of good faith and fair dealing when, among other things, it did the  
3 following:

- 4           a. wrongfully and unreasonably breached its statutory duty to inform its  
5 insureds of their right to be represented by independent counsel under  
6 2860;
- 7           b. wrongfully and unreasonably forced the LJCD defendants to  
8 adjudicate the *Barbara B.* lawsuit in a public trial, rather than in  
9 private, binding arbitration, in disregard of LJCD's express wishes  
10 and best interests, and at a time when the LJCD defendants should  
11 have been controlling their own defense through independent counsel;
- 12           c. intentionally misrepresented coverage available under the Professional  
13 Liability Coverage Part in an effort to coerce LJCD to contribute  
14 toward a settlement of the underlying *Barbara B.* lawsuit;
- 15           d. intentionally misrepresented to LJCD the rates it paid to its panel  
16 counsel to defend similar actions in San Diego;
- 17           e. deliberately failed to pay any of LJCD's independent counsel fees and  
18 costs;
- 19           f. ignored and failed to respond to correspondence from LJCD's counsel  
20 demanding payment of independent counsel fees and costs.

21           27. As a direct and proximate result of the above-mentioned breaches of the duty  
22 of good faith and fair dealing, LJCD has been damaged in an amount to be proven at trial.  
23 Said damages exceed the jurisdictional minimum required by this court.

24           28. LJCD is informed and believes and on that basis alleges that Philadelphia  
25 has deliberately denied insurance benefits to LJCD, despite knowing facts which  
26 established that LJCD was clearly and unambiguously entitled to such benefits.  
27 Philadelphia made a calculated and deliberate decision to act in this manner and gamble  
28 that its actions would go unchallenged. Philadelphia has intentionally withheld benefits

1 despite knowledge of its contractual and statutory obligations, and has acted with an  
2 intent to enrich itself while injuring and harming LJCD. Philadelphia's conduct in this  
3 matter clearly satisfies the statutory grounds of "oppression, fraud or malice" so as to  
4 justify an award of punitive damages in order to punish it and to deter such conduct in the  
5 future.

6 **WHEREFORE**, Plaintiff LJCD prays for judgment against defendant Philadelphia  
7 as follows:

8 1. For damages sustained as a result of the breaches and tortious breaches of  
9 contract alleged herein, according to proof;

10 2. For damages sustained as a result of the breaches of California Civil Code  
11 section 2860 alleged herein, according to proof;

12 3. For attorney's fees including, but not limited to, an award of attorney's fees  
13 pursuant to *Brandt v. Superior Court*, 37 Cal. 3d 813 (1985);

14 4. For punitive damages pursuant to California Civil Code section 3294; and

15 5. For prejudgment interest, costs and expenses of suit, and such other and  
16 further relief as the Court deems just and proper.

17  
18 DATED: April 22, 2011

OSBORNE & NESBITT LLP

19  
20  
21 By: s/Gary W. Osborne

Gary W. Osborne

Attorney for Plaintiff LA JOLLA  
COUNTY DAY SCHOOL

Email: [gosborne@onlawllp.com](mailto:gosborne@onlawllp.com)



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12 UNITED STATES DISTRICT COURT  
13 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

14 LA JOLLA COUNTRY DAY  
15 SCHOOL, a California non-profit  
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18 vs.

19 PHILADELPHIA INDEMNITY  
20 INSURANCE COMPANY, a  
21 Pennsylvania corporation,

22 Defendants.

CASE NO. **'11CV0868 LAB WMC**

**DEMAND FOR JURY TRIAL**

23 Plaintiff La Jolla Country Day School hereby demands a trial by jury.

24 DATED: April 22, 2011

OSBORNE & NESBITT LLP

25 By: s/Gary W. Osborne

26 Gary W. Osborne  
27 Attorney for Plaintiff LA JOLLA  
28 COUNTY DAY SCHOOL  
Email: [gosborne@onlawllp.com](mailto:gosborne@onlawllp.com)

## CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

**I. (a) PLAINTIFFS**

La Jolla Country Day School

(b) County of Residence of First Listed Plaintiff San Diego

(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Gary W. Osborne, Esq., Osborne & Nesbitt LLP  
501 W. Broadway, #1760, San Diego, CA (619) 557-0343

**DEFENDANTS**

County of Residence of First Listed Defendant

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE  
LAND INVOLVED.

Attorneys (If Known)

**'11CV0868 LAB WMC****II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

**III. CITIZENSHIP OF PRINCIPAL PARTIES** (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |   |                                       |                            |   |                            |                                       |
|---|---------------------------------------|----------------------------|---|----------------------------|---------------------------------------|
|   | PTF                                   | DEF                        |   | PTF                        | DEF                                   |
| Citizen of This State                   | <input checked="" type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4            |
| Citizen of Another State                | <input type="checkbox"/> 2            | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input checked="" type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3            | <input type="checkbox"/> 3 | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6            |

**IV. NATURE OF SUIT** (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input checked="" type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<b>PERSONAL INJURY</b> <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	<b>PRISONER PETITIONS</b> <input type="checkbox"/> 510 Motions to Vacate Sentence <b>Habeas Corpus:</b> <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>SOCIAL SECURITY</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609
			<b>IMMIGRATION</b> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609
				<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes

**V. ORIGIN**

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from another district (specify)
- ☐ 6 Multidistrict Litigation
- ☐ 7 Appeal to District Judge from Magistrate Judgment

**VI. CAUSE OF ACTION**

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

28 U.S.C. Section 1331

Brief description of cause:

Breach of insurance contract and bad faith

**VII. REQUESTED IN COMPLAINT:**

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$ An amount exceeding \$75,000

CHECK YES only if demanded in complaint:  
JURY DEMAND: ☒ Yes ☐ No

**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

04/22/2011

s/Gary W. Osborne, Esq.

FOR OFFICE USE ONLY

RECEIPT # \_\_\_\_\_ AMOUNT \_\_\_\_\_ APPLYING IFP \_\_\_\_\_ JUDGE \_\_\_\_\_ MAG. JUDGE \_\_\_\_\_